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No. 08-365

Supreme Court, U.S.
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In The

Supreme Court of the United States

HAKAN OZCELIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY OF PETITIONER TO BRIEF OF UNITED STATES IN OPPOSITION

DIARMUID WHITE
Counsel of Record
BRENDAN WHITE
WHITE & WHITE
148 East 78th Street
New York, NY 10075
(212) 861-9850

Attorneys for Petitioner

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ARGUMENT

Contrary to the Government's position, the question raised in this Petition warrants further review, not only because it asks the Court to extend the principle that a defendant's uncorroborated statements are not legally sufficient to prove that a crime was committed to situations in which the defendant is charged under an aiding and abetting theory, but also because it provides the Court an opportunity to recognize formally that that rule extends beyond the narrow category of after-the-fact confessions to a broad category of extrajudicial statements, including those at issue here.

1. The Government points out that the factual circumstances of *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Opper v. United States*, 348 U.S. 84 (1954), related to post-conduct admissions and confessions, and suggests that the concerns present in such scenarios – that "the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession" – are not present in this case. (Gov. Brf. at 8-9) But whatever the particulars of *Wong Sun* and *Opper*, the principles derived from those cases and their progeny have had greater applicability than just to after-the-fact confessions.

Courts have interpreted *Wong Sun* to apply to a variety of "uncorroborated extrajudicial statements" made before, during, or after the actual offense conduct. Notably, federal courts of appeals have applied *Wong Sun* in situations analogous to that here, in which the statements were made to undercover law enforcement during the pendency of the conduct at issue. *See United States v. Wolfenberger*, 696 F.2d 750, 751, 753 (10th Cir. 1982) (noting defendant's "conviction under section 922(h)(1) was based solely on an uncorroborated extrajudicial statement he had made to undercover agents," and *citing Wong Sun* for principle that "[a] defendant cannot be convicted of a crime solely on the basis of an uncorroborated extrajudicial statement"); *United States v. Shunk*, 881 F.2d 917, 918 (10th Cir. 1989) (under similar circumstances, "[t]here is no question that the defendant's statements to the [undercover] officer regarding ownership of the pistol should be characterized as admissions by a party opponent within the definition set forth in Fed. R. Evid. 801(d)(2)(A)[, which] admissions formed the principal basis upon which the defendant's conviction rests"); *see also United States v. Curtis*, 324 F.3d 501, 504, 507 (7th Cir. 2003) (extrajudicial statements came via testimony of co-conspirators, who recounted statements made by defendant before, during, and after charged murders, and court noted defendants were "correct that an uncorroborated party admission is insufficient to support a criminal conviction," *citing Wong Sun*); *United States v. Fearn*, 589 F.2d 1316, 1322 (7th Cir. 1978) (in prosecution for making a false

material fact in a loan application, holding that admissions made by defendant to landlord shortly after having sought loan were "not sufficient to sustain the conviction unless there is sufficient corroboration in the other evidence adduced at trial").

2. Among the cases cited by the Government is *Warszower v. United States*, 312 U.S. 342 (1941), in which the Court concluded that statements made prior to the commission of an offense do not require the same corroboration as confessions or admissions after the fact. *Warszower* was decided well before *Opper*, however, and nearly two decades before *Wong Sun*, both of which, it is respectfully submitted, have broader application than the narrow conclusion reached in *Warszower*, as indicated by the more expansive interpretations in the cases cited above. To the extent that the Government cites intermediate appellate court cases concluding that statements made during the course of a defendant's criminal conduct – including statements made to a defendant's criminal accomplices – do not need additional corroboration, (*see* Gov. Brf. at 9, *citing Ogden v. United States*, 303 F.2d 724, 742 (9th Cir. 1962); *United States v. Simmons*, 923 F.2d 934, 954 (2d Cir. 1991); *United States v. Waldemer*, 50 F.3d 1379, 1388 (7th Cir. 1995)), the conflict between those cases and the cases cited above in which the opposite conclusion was reached is, of course, a reason why certiorari should be granted, in order to resolve any tension in the interpretation of *Opper* and *Wong Sun*.

3. The Government further relies upon the Court's traditional rule precluding grant of certiorari with respect to questions not pressed or passed upon below. (Gov. Brf. at 8, *citing United States v. Williams*, 504 U.S. 36, 41 (1992).) That rule poses no obstacle to review here, however, since the sufficiency of the evidence was squarely before the court of appeals, and the court itself expressly reached the conclusion that, although the only evidence that a crime was committed by another was the defendant's own statements, those statements by themselves were legally sufficient to prove Petitioner's guilt under an aiding and abetting theory. (App. 15 ("we cannot say as a matter of law that no reasonable juror could accept the government's theory premised on Ozcelik's own statements.")) For that reason, it was the court of appeals' holding that raised the question of whether such evidence can be sufficient as a matter of law, a question regarding which *Wong Sun* and *Opper* provide guidance. In any event, Petitioner does not rely on those cases as directly controlling authority, but urges that the same principles underlying them apply to an equal, and arguably greater, extent when a defendant's uncorroborated statements provide the sole evidence that a crime was committed by another individual.

4. The remaining arguments raised by the Government are not germane to the question of whether certiorari should be granted on the specific question presented here. Whether or not there was

adequate evidence corroborating Petitioner's statements, as the Government contends (Gov. Brf. at 10), would only become an issue after the threshold question – namely, whether such corroboration is legally required – had been answered by the Court. Likewise, the Government's additional arguments taking issue with aspects of the court of appeals' decision do not support the assertion that "[t]his case also would be a poor vehicle in which to address the issue petitioner presents." (Gov. Brf. at 10-11) To the contrary, the court of appeals' holding framed the issue in a pure and straightforward manner, recognizing that the evidence purporting to demonstrate that a crime was committed by another was limited strictly to the defendant's statements, and concluding that such evidence was legally sufficient in itself. Whether this determination was correct is the important question before the Court, and the Court should use this opportunity to make it clear, as a matter of law, that more is required than the uncorroborated extrajudicial statements of the defendant to prove that a crime was committed by another when a prosecution is based on a theory that the defendant aided and abetted another.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, NY
January 6, 2009

Respectfully submitted,

DIARMUID WHITE
BRENDAN WHITE
WHITE & WHITE
148 East 78th Street
New York, NY 10075
(212) 861-9850

Attorneys for Petitioner